No. 97-634

In The
Supreme Court of the United States
October Term, 1997

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,,

v.

RONALD R. YESKEY, Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE*
STATES OF NEVADA, OHIO, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, TERRITORY OF GUAM, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGIN ISLANDS, VIRGINIA AND WYOMING IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTIONAL PROVISIONS

STATUTES

FEDERAL REGULATIONS

STATE REGULATIONS

INTEREST OF THE AMICI

The States of Nevada and Ohio, together with 34 other *amici* States and Territories, write to urge the Court to reverse the decision of the United States Court of Appeals for the Third Circuit. At stake in this matter is whether Congress made the Americans with Disabilities Act, 42 U.S.C. §12111, *et seq.* ("ADA"), applicable to State prisons, an issue that has wide-ranging consequences for the States. The States of course have a compelling interest in the control and management of their prisons. And because application of the ADA to State prisons makes the diverse prison-management objectives of punishment, deterrence and rehabilitation all the more difficult to achieve, we share Pennsylvania's concerns in this case.

Pennsylvania argues that when Congress enacts legislation that would affect core State functions and would upset the federal balance if made applicable to the States, it must make its intention to do so unmistakably clear. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). In support, we offer this brief to illustrate the impact of the ADA on the States' management of their prisons and to emphasize the serious constitutional questions implicated by extension of the ADA to State prisons.

SUMMARY OF ARGUMENT

State prison officials supervise the activities of convicted felons in an environment that necessarily involves a high degree of control. They must be able to classify and manage disabled and non-disabled inmates alike based upon sound principles of correctional administration, the first and foremost being the safety and security of prison employees and inmates. Though entirely well-intentioned, the ADA

markedly intrudes on these functions, and in the end interferes with what has long been deemed one of the States' core sovereign functions. *See Preiser v. Rodriguez,* 411 U.S. 475 (1973). The intrusion has caused many practical problems. It has led to accommodation demands of all sorts, many of them exceedingly unreasonable in light of the environment in which they arise and all of them piled on top of the many accommodation requirements that the States already responsibly impose upon themselves.

A State prison system that houses State citizens convicted of violations of State law does not affect interstate commerce. *See United States v. Lopez* 115 S.Ct. 1624 (1995). Even the broad authority Congress has under the Interstate Commerce Clause to regulate commerce among the States therefore does not extend to this distinctly local activity.

The ADA also authorizes money-damages actions against the States in federal courts. This, too, exceeds federal authority because it compromises the States' immunity from suit under the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1997). As *Seminole Tribe* makes clear, Congress may not use its Article I powers to circumvent limitations that the Constitution places on federal jurisdiction.

Congress no doubt may overcome these limitations on its power by relying on section 5 of the Fourteenth Amendment. But, in order to exercise this remedial power, it must establish a proper predicate for doing so -- which is to say, it must show that the States have violated the equal-protection rights of inmates by discriminating against them in the past, and even then only if the remedial legislation Congress enacts remains proportional to the nature of these

violations. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). No such showing, however, has been -- or could be -- made here. Extension of the ADA to the State's eminently local management of their prisons simply did not contain the requisite predicate for exercise of Congress's remedial power.

ARGUMENT

I. THE ADA UNDERMINES THE STATES' ABILITY TO MANAGE INMATES AND TO ALLOCATE LIMITED RESOURCES WITHIN THEIR PRISON SYSTEMS.

The management of state prisons represents an integral part of the criminal justice system of each State. Indeed, it "is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973).

In managing frequently-dangerous criminals, prison officials regularly make decisions affecting the safety and security of inmates committed to their custody. This occasionally means that disabled and non-disabled inmates are treated differently. Accommodation of disabled inmates, whether they suffer from a mental or physical disability, simply does not always work in a prison setting. For example, it may not be appropriate to supply a prosthetic device to a violent, but disabled, inmate -- not because the State lacks sensitivity to the inmate's plight but because a heavy prosthetic device may be used as a weapon and thereby pose security risks. In order to preserve internal safety and security, prison administrators must remain free to adopt and

carry out policies and practices that require treating inmates with different disabilities differently.

Even without the ADA, moreover, State prison officials already face obligations that require some accommodation of disabled inmates. Under the Eighth Amendment, the States of course cannot be deliberately indifferent to inmates' serious medical needs, whether the inmates are disabled or not. What the ADA does, however, is put disabled inmates in a special additional category, entitling them to greater consideration. Outside the prison context, to be sure, this may make sense. But in the prison setting, the perception that other inmates are receiving special treatment (deserved or not) often results in management problems for prison administrators.

But the real problem is the wide breadth of claims covered under the ADA, many of them simply unsuitable for realistic management of a State prison. The legislation covers just about every physical and mental ailment that an inmate could possibly have. *See* 28 CFR Ch. 1 (35.104 Definitions). Not surprisingly, a whole host of ADA-based claims have been filed throughout the country. Consider the following: HIV- positive inmate and wife claimed a right to conjugal visits (*Bullock v. Gomez*, Case No. CV-95-6634, U.S. District Court of California); inmate with alleged mobility impairment claimed a right to an exemption from wearing restraints (*St. Pierre v. McDaniel*, Case No. CV-N-94-792-ECR, U.S. District Court for the District of Nevada); arthritic inmate claimed right to touch-sensitive typewriter (*Halpin v. Mathews*, Case No. GC-G 94-1935, U.S. District Court for the Middle District of Florida); inmate with visual problems claimed a right to be transferred from maximum security prison (*Walker v. Washington*, Case No. 96 C 469, U.S. District Court for the Northern District of Illinois); inmate

with alleged sleeping disorder claimed a right to a single cell (*Couming v. Matesanz*, Case No. 96-7328, Middlesex Superior Court C.A.). In one Iowa case, later reversed, the district court held that an inmate housed in the infirmary was entitled to a personal TV with cable despite the availability of one in the day room. *Aswegan v. Bruhl*, 113 F.3d 109 (8th Cir. 1997).

In several class actions, inmates are demanding costly structural modifications to the prisons as well as access to programs, in some instances even after the State has already made large accommodations. In *Armstrong v. Wilson*, 124 F.3d. 1019 (9th Cir. 1997), and *Clark v. State of California*, 123 F.3d. 1267 (9th Cir. 1997), for instance, inmates and parolees with a variety of disabilities sought additional construction and system-wide classification changes, even though the State had already devoted millions of dollars providing facilities specially designed for the disabled. In light of the broad definition of disability under the ADA, a wide range of inmates may claim that their disability requires accommodation into all manner of prison services, activities and programs. The States of California and Florida, for example, have 39 and 31 prison-based ADA actions pending respectively.

One unfortunate consequence of this litigation onslaught is the elimination of programs designed to benefit inmates. In this case, for instance, Mr. Yeskey demanded admission to a prison boot camp program even though his hypertension disqualified him. Many state statutes authorizing boot camp programs require strenuous physical activity. *See, e.g.*, Del.C. §6704, 6709; D.C. Code 1981 §24-821; Fla.S.A. §958.045; Texas C.C.P. Art. 42.12; Va. St. 53.1-67.1. If prison administrators are required to modify programs to accommodate inmates with disabilities that would

ordinarily disqualify them from the activity, the program will face either non-compliance with the statute or non-compliance with its underlying goals. In either event, States understandably will see little benefit to continuing with the program.

At the end of the day, decisions in prison systems simply are not made -- and have never been made -- in accordance with the same considerations that govern life outside prison walls. Compelling the complete accommodation of all inmates claiming disabilities interferes with the ability of prison administrators to keep safety and security the overriding concern of prison administration.

II. AN EXTENSION OF THE ADA TO STATE PRISONS WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

In arguing that the ADA does not apply to State prisons, Pennsylvania quite properly turns to the clear statement requirements of *Gregory v. Ashcroft*, 501 U.S. 453 (1991). As Pennsylvania correctly recognizes, and as we agree, an extension of the ADA to State prisons would raise several serious constitutional concerns.

The ADA's statement of "purpose," it is true, attempts to rely on the wide range of authority that Congress may exercise in this area. It thus

> invoke[s] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. 12101(b)(4). Yet even the broadest invocation of congressional authority does not extend to an application of the ADA in prison settings.

A. Congress Lacks Authority Under the Commerce Clause to Apply the ADA in the Context of State Prisons.

As an initial matter, there is serious doubt whether Congress may regulate state prisons under the Commerce Clause. Under Article I, section 8 of the United States Constitution, Congress has authority only "[t]o regulate Commerce . . . among the several States." While the powers afforded to Congress under the clause remain broad, *see, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942), they are not unlimited, *see, e.g., United States v. Lopez* 115 S.Ct. 1624, 63 U.S.L.W. 4343 (1995).

Confirming the point, *Lopez* invalidated a federal law prohibiting possession of a firearm in a local school, concluding that it does not sufficiently affect interstate commerce to invoke Congress's Commerce Clause powers. In doing so, the Court rejected the argument that guns in schools may result in violent crime, which in turn could affect the national economy through higher insurance rates and reduced travel. At the same time, *Lopez* also rejected the argument that guns in local schools will handicap the educational process, lead to a less productive citizenry, and thereby also potentially affect interstate commerce. The Court held that such tenuous connections to interstate commerce would not support Congressional regulation of local affairs, and would come close to extending congressional authority under the Commerce Clause to a point of no return. 63 U.S.L.W. at 4348.

In many respects, Congress's efforts to regulate State prisons under the ADA parallel the deficiencies in its efforts to regulate the possession of guns near schools. Particularly when it comes to a State charged with housing citizens of its own State who have violated that State's laws, it would seem hard to fathom that the activity implicates commerce among the States. What connections there may be, moreover, are far too attenuated to supply the requisite connection to commerce. Whether it be the purchasing of food and other necessary supplies, or even the transfer of prisoners from one prison to another, neither type of activity suffices to convert what remains an inherently local activity into an interstate one. State prisons remain what they always have been: self-contained facilities designed to keep criminal offenders in one place, and most conspicuously not in interstate commerce.

As in *Lopez*, in short, so here: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 63 U.S.L.W. at 4348. The question of power here raises a serious constitutional question.

B. Congress Lacks Authority to Abrogate the State's Sovereign Immunity.

Even if Congress could extend the ADA to State prisons under its commerce clause powers, it could not use those powers to abrogate a State's sovereign under the Eleventh Amendment. Under that provision, States generally are immune from suit -- particularly money-damages actions -- in federal court.

In full, the Eleventh Amendment provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Am XI, U.S. Const. The amendment embodies a "broad constitutional principle of sovereign immunity" of the States. *Welch v. State Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987).

Most notably, in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1117 (1996), the Court made clear that Congress could not abrogate a State's sovereign immunity under its commerce clause powers. In doing so, the Court expressly overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held that Congress could subject the States to money-damages actions in federal court and thereby waive their Eleventh Amendment immunity.

As the ADA permits prison inmates to file money-damages actions in federal court, it plainly implicates the States' Eleventh Amendment rights. Nor after *Seminole Tribe* may Congress tenably contend that it may abrogate this immunity under its commerce clause powers. Still, however, Congress retains power to abrogate these rights when it is acting under a valid grant of authority -- specifically, its remedial authority under Section 5 of the Fourteenth Amendment.

C. Congress Lacks Authority Under The Fourteenth Amendment to Apply the ADA in the Context of State Prisons.

Congress's Section 5 remedial power is the only way in which the legislature either could abrogate the State's immunity from suit or obtain power to regulate the intrastate activity of managing a local prison. However, under *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), it seems doubtful that this remedial source of authority exists here.

The Fourteenth Amendment provides in pertinent part:

> Section 1...No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Although Section 5 is a "positive grant of legislative power," *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), this Court has never held that Section 5 authorizes Congress to establish rights not otherwise created by the Fourteenth Amendment except as a remedy for *constitutional* violations by the States. Indeed, Congress' Section 5 authority since the days of Reconstruction has been limited to outlawing or preventing state laws or practices that violate Fourteenth Amendment rights -- as that Amendment has been construed by the federal courts. *See, e.g., The Civil Rights Cases*, 109 U.S. 3, 11 (1883). *See also, Ex parte Virginia*, 100 U.S.

339, 348 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

City of Boerne v. Flores, 117 S.Ct. 2157 (1997) reaffirmed these holdings and more. It made clear that Section 5 authorizes Congress only to "enforce" the Fourteenth Amendment -- *i.e.*, to "remedy" *actual violations* of the Fourteenth Amendment -- not to decree or redefine the substance of the Fourteenth Amendment's restrictions on the States:

> *Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.* Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

117 S.Ct. at 2163-64 (emphasis added).

Neither disability itself nor the record of the States' treatment of disabled prisoners appears to satisfy the required nexus between a Section 1 violation of the Fourteenth Amendment and the ADA remedy that *City of Boerne* requires. Disability is not a suspect or quasi-suspect classification and is therefore subject only to "rational basis" scrutiny under the Equal Protection Clause. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *More v. Farrier*, 984 F.2d 269, 271 (8th Cir.), *cert. denied*, 510 U.S. 819 (1993); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1420 (10th Cir. 1992). What is more, the *amici* States are not aware of any extant record of state government activity involving any discriminatory animus against disabled

prisoners, let alone against individuals who work for the State.

As Congress only has the power to enforce substantive protections under the Fourteenth Amendment, not to create new ones, it cannot force the States to adopt a standard with regard to disabled inmates that is not constitutionally required by the Fourteenth Amendment. The ADA would force such a standard on State prisons.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to reverse the decision below.

Respectfully submitted,

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